United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

920

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,953

S I D N E Y L. G R O S S,

Appellant,

v.

U N I T E D S T A T E S O F A M E R I C A,

Appellee

Forma Pauperis Appeal from a Judgment of the United States District Court for the District of Columbia

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March 8, 1968

QUESTIONS PRESENTED

The questions presented by this appeal are:

1. Has the Appellant been denied his Constitutional or statutory right to a speedy appeal where a jury verdict was returned on December 14, 1966, where appeal was authorized and a trial transcript ordered by a District Court Judge on April 6, 1967, where a part of the transcript was transmitted to Appellant's counsel on September 25, 1967, and despite periodic and timely requests by counsel a complete transcript was not docketed until February 7, 1968?

2. Did the lower Court err in permitting in-court identification of Appellant by the key prosecution witness after the witness testified to his pretrial identification of Appellant at a police station where Appellant, then unrepresented by counsel, was exhibited to the witness in a room occupied by a police officer, the Appellant, and no one else?

3. Was the police station identification of Appellant by the key witness of such a suggestive nature under the facts of this case that a new trial must be ordered?

4. Under the facts of this case was the jury sufficiently warned of the inherent unreliability of accomplice testimony?

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,953

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U N I T E D S T A T E S O F A M E R I C A,

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B R I E F F O R A P P E L L A N T

JURISDICTIONAL STATEMENT

Appellant, Gross, was indicted for housebreaking and larceny on April 25, 1966, and was tried on June 28, 29 and 30, 1966. The jury was unable to agree upon a verdict. Appellant, Gross, was

again tried on December 13 and 14, 1966, and was convicted by a jury on both counts. On March 17, 1967, Appellant was sentenced to serve terms of from two (2) to six (6) years on each count, said terms to run concurrently. On April 6, 1967, the District Court authorized Appellant to proceed on appeal without prepayment of costs. The jurisdiction of this Court is invoked pursuant to 28 U.S. Code 1291.

STATEMENT OF THE CASE

At two A.M. on Saturday, March 19, 1966 a fur store at 1620 Wisconsin Ave., N.W. was broken into and a fur piece stolen.

The key Government witness, Mr. Krause, observing the incident from his second floor apartment at 1632A Wisconsin Ave., N.W., saw a man with a fur on his arm cross this street and enter a waiting car. He estimated the distance from his apartment to the scene of the crime to be about seventy-five feet, Tr., pp. 15, 19.

Mr. Krause jotted down the auto tag number and called the police. When they arrived he described the man as wearing "a white or light colored raincoat...not necessarily perfectly white," a broad brimmed hat, and dark slacks. He described him as "a fairly good sized person, approximately my own size," and described his age as middle or late twenties, Tr., pp. 21-23.

The police report, PD 163, compiled from information given by Krause, however, referred only to a Negro male in his early twenties, Tr., pp. 119-120. Based on Krause's identification of the license tag number of the car, the police went to the area of the

address where the car was registered and waited. The car appeared, stopped, the driver (later identified as James Short, Jr.) fled, the police gave chase but could not apprehend him. The police returned to the registered address, that of Short's father who later talked to his son by telephone and persuaded him to turn himself in, which he did around seven A.M. Short was charged with housebreaking and window smashing on Saturday, Tr., p. 55.

Short told the police that he had been the driver for the man who committed the crime, that he had met him only the night before, that the only name he knew him by was "Sid," and that they were to rendezvous at 7th and Kennedy Streets, N.W. at nine A.M. The police with Short in the car waited in that area for some considerable period of time. Appellant did not appear. Then they cruised the area around 14th and Irving Streets, N.W. At twelve noon Short identified the Appellant who was on the sidewalk. The police thereupon arrested the Appellant.

Shortly after twelve noon Krause was called to the Seventh Precinct police station and conducted to a room in which the defendant was held, Tr., p. 30. Respecting this episode the prosecution inquired:

> "Q...did the officer there take you in to look at a line-up of a number of people?
>
> "A. No, it was one person.
>
> "Q. But were there a number of people?
>
> "A. No, there was one police officer and one non-police officer at the time.
>
> "Q. And was this person standing or seated?

"A. He was seated. Well, I will redefine that. I believe he was standing up." Tr., pp. 31, 32.

Having observed the defendant, Krause left the room and was then asked by the police officer if he thought the defendant was the same person he had seen at the scene of the crime, to which he replied affirmatively, Tr., p. 32.

Detective Orme described the identification:

"Mr. Krause came down to look, and Sidney Gross was sitting there, and I told him to stand up and Mr. Gross stood up, and he said that was the man he saw getting into the car, and he identified him as the man." Tr., pp. 125-126.

At no time during or prior to this identification procedure was Appellant represented by counsel. Court records first indicate the presence of counsel on May 6, 1966, at arraignment.

Short was released on Sunday and the charges against him dropped on Monday. He was a prosecution witness in both trials.

An indictment was filed on April 25, 1966, in the United States District Court for the District of Columbia charging Appellant, Gross, with violation of 22 D. C. Code, Section 1801, and 22 D. C. Code 2201, housebreaking and larceny respectively, allegedly committed on or about March 19, 1966. On May 6, 1966, Appellant appearing in open court and accompanied by his attorney pleaded Not Guilty. No court records indicate that an attorney was appointed for Appellant prior to that date. The case was tried on June 28, 1966. The jury could not agree and a mistrial was declared.

Appellant was retried on December 13 and 14, 1966, pursuant to the original indictment. He was convicted by the jury on both

charges. He was sentenced by the court on March 17, 1967, to serve not less than two (2) years nor more than six (6) years on each count, said sentences to run concurrently.

On April 6, 1967, the United States District Court authorized an appeal without prepayment of costs and further ordered that all of the transcript of the trial, except voir dire and opening statements of counsel be prepared at the expense of the United States.

On May 6, 1966, and August 26, 1966, Gross was denied release on personal bond by the District Court and Gross has been in custody continuously since March 19, 1966.

On May 2, 1967, Kingdon Gould, Jr. was appointed as counsel for Appellant. Subsequently Mitchell Blankstein entered an appearance as co-counsel.

On May 10, 1967, and periodically thereafter, counsel for Appellant requested receipt of the transcript of trial. An incomplete transcript was received September, 1967, and a complete transcript was docketed on February 7, 1968.

A Motion based on delay in receipt of trial transcript was filed on January 22, 1968, and is still pending before this Court.

CONSTITUTIONAL PROVISONS, STATUTES, AND RULES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> "No person...shall be deprived of life, liberty, or property, without due process of law...."

The Sixth Amendment to the United States Constitution provides in pertinent part as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...."

Title 28, section 1915 provides in pertinent part:

"(a) Any court of the United States may authorize the commencement...of any suit..., civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor....?

"(b) In any civil or criminal case the court may... direct that the expense of printing the record on appeal...be paid by the United States....?

Rule 48(b) of the Federal Rules of Criminal Procedure provides in pertinent part:

"If there is unnecessary delay...in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

STATEMENT OF POINTS

Appellant intends to rely on the following points in this appeal.

1. The conviction must be reversed and the indictment dismissed because Appellant has been denied a reasonably prompt receipt of a trial transcript and thus denied a speedy appeal.

2. The case must be remanded to the District Court to determine if the police station identification of Appellant by the key prosecution witness was harmless beyond a reasonable doubt. If the District Court cannot declare such a belief then the conviction must be reversed and a new trial ordered from which all police station identifications shall be excluded.

3. The conviction must be reversed and a new trial ordered because the police station identification procedure was of such a suggestive nature that it tainted the witness' subsequent in-court identification of Appellant.

4. The conviction must be reversed because of the District Court's failure to sufficiently instruct the jury of the inherent unreliability of accomplice testimony under the facts in this case.

SUMMARY OF ARGUMENT

I

Appellant was denied a speedy appeal in contravention of the Sixth Amendment to the Constitution of the United States and his statutory rights.

II

Pretrial police station identification of Appellant by the key prosecution witness was under such suggestive circumstances that the witness' in-court identification of Appellant was tainted. The minimal remedy would be a remand to the District Court for a determination on the extent of the tainting.

III

The pretrial police station identification of Appellant by the key prosecution witness was under such suggestive circumstances that the witness' in-court identification of Appellant was so tainted that it should have been excluded.

IV

Appellant, under the circumstances of this case, was denied a proper instruction as to the inherent unreliability of accomplice testimony.

ARGUMENT

I.

APPELLANT WAS DENIED A SPEEDY APPEAL IN VIOLATION OF HIS RIGHTS

The Sixth Amendment to the Constitution of the United States grants to any accused the right to a speedy and public trial. This constitutional right should extend also to a reasonably speedy appeal. The question of whether, given a right of appeal, there is a constitutional requirement that it be a speedy appeal has not been definitively determined. Cf, Hardy v. United States, 375 U.S. 277, 282 (1964) where the United States Supreme Court, considering the related issue of a right to a transcript of trial proceedings states, "We deal here only with the statutory scheme and do not reach a consideration of Constitutional requirements."

The statutory and decisional requirement of a speedy appeal is clear. Appellant has a statutory right to a trial transcript, 28 U.S.C. Section 1915. The Transcript of Trial is an integral part of the appellate process, Hardy v. United States 375 U.S. 277 (1964). A defendant has a statutory right to a speedy trial, Fed. R. Crim., P., Rule 48(b) and this statutory right includes reasonably prompt receipt of the transcript in order that prosecution of the appeal for which it is furnished is not thwarted. Holmes v. United States 383 F. 2d 925 (C.A.D.C., 1967)

In this appeal, the complete trial transcript was filed ten months after the District Court had ordered the Transcript of Proceedings be prepared and one week less than fourteen months after the trial.

The inordinate delay here, in spite of periodic and timely requests by counsel, in receiving a trial transcript clearly violates the requirement of a reasonably prompt receipt of a trial transcript. These factors are clearly delineated by the chart set forth on the following page.

EVENT	DATE	DAYS FROM THE ORDERING OF TRANSCRIPT	DAYS OF CUMULATIVE DELAY
Trial	12/13 & 14/66		
Sentencing	3/17/67		
Transcript ordered by District Court	4/6/67		
Transcript requested by Appellant	5/10/67	34	
Transcript requested by Appellant "without further delay"	8/31/67	113	147
Transcript requested by Clerk of Court of Appeals	9/11/67	11	158
Further request by Clerk of Court of Appeals	9/22/67	11	169
Incomplete transcript received by Appellant	10/13/67	21	190
Notification to Clerk of Court of Appeals of incompleteness of transcript	10/18/67	5	195
Complete transcript requested by Clerk of Court	10/19/67	1	196
Transcript requested by Appellant "urgently...by return mail if possible"	12/15/67	57	253
Further request by Clerk of Court of Appeals	12/27/67	12	265
Advice by Clerk of Court to Appellant that Reporter will "expedite" transcript	1/3/68	7	272
Motion filed	1/22/68	19	291

The result we seek here is in the interest not only of the Appellant, but also of the public and effective law enforcement. The public is benefited by effective law enforcement as "[D]elay in the final judgment of conviction including its appellate review, unquestionably erodes the efficacy of law enforcement." Coppedge v. United States 383 U.S. 116, 120 (1966).

There is presently pending before this Court a Motion For Reversal and Remand With Instructions To Enter Judgment of Acquittal. Said Motion, filed on January 22, 1968, is predicated on the points set forth in this section of the Brief. The Motion had not been decided as of the writing of this Brief.

II.

THE PRETRIAL SUGGESTIVE IDENTIFICATION FALLS WITHIN THE PURVIEW OF WRIGHT V. U.S., REQUIRING AS MINIMAL RELIEF A REMAND

It is obvious that the absence of counsel would cause this case to fall within the ambit of the rule of the decisions of United States v. Wade, U.S., 18 L. Ed. 2d 1149 (June 12, 1967) and Gilbert v. California, U.S., 18 L. Ed. 2d 1178 (June 12, 1967), were it not that Stovall v. Denno, 388 U.S. 293, 18 L. Ed. 2d 1199 (1967) applied to the rationale of Wade and Gilbert a prospective limitation from June 12, 1967 and the unrepresented identification herein occurred on March 19, 1966. This Court has decided not to vary from this rule in the exercise of its supervisory authority. Wright v. United States, No. 20, 153 (D.C. Cir., January 31, 1968), see, also, Borum v. United States, No. 20, 270 (D.C. Cir., December 21, 1967).

However, it is also obvious that the admission of Krause's station house identification is controlled by Wright which will require, as a minimum, the remanding of the case to the District Court for an evaluation of the extent to which the case was tainted by station house identification.

It cannot be denied that an aura of suggestive identification surrounded Krause's visit to the police station. Appellant was exhibited to him in a room occupied only by the Appellant and a policeman. The Appellant was made to stand. After the viewing, Krause was asked if he "thought" (Tr., p. 32) Appellant was the man he had seen at two A.M.

Appellant was without counsel, he was not permitted even the protection of a partial line-up. There was no revelation of the elements of identification by which Krause reached his conclusion; i.e., no reference to distinctive physical features, garb or unusual characteristics. There was no showing that without the pretrial identification Krause could have made an in-court identification based upon his original observation of the crime.

It is clear that as a result of all these factors Appellant was denied his right not to be deprived of liberty without due process of law, a right granted by the Fifth Amendment to the Constitution of the United States.

Under these circumstances, minimal relief required that the District Court test the extent by which the in-court identification was tainted by the pretrial episode. Wright v. U.S., supra.

III.

THE PRETRIAL SUGGESTIVE IDENTIFICATION EXCEEDS WRIGHT V. U.S. AND ON THESE FACTS A NEW TRIAL SHOULD BE GRANTED

It is respectfully submitted, however, that this Court, on the basis of the facts before it (as the Court was unable to conclude in Wright v. United States, supra, for lack of information) cannot conclude otherwise than that the station house identification could never meet the test of "harmless beyond a reasonable doubt." Gilbert v. California, 388 U.S. 263, 274; Chapman v. California, 386 U.S. 18, 24 (1967). Three salient features of the instant case stand out.

A.

Identification At The Crime Was Difficult

First, the viewing of the crime was not conducive to easy identification. It was at night, Krause was seventy-five feet away. The man he saw was moving and wore a broad brimmed hat. Krause saw him only as he crossed the street and got into the car. All that appeared on PD 163 prepared from the information which Krause gave the police was the auto tag number and the description of a Negro male in his early twenties. That even this rudimentary identification of a human being, so broad that it described one quarter of the adult Negro male population of Washington, was inaccurate is patently clear from Krause's own testimony:

> "Well, I thought the person looked younger than he actually turned out to be." Tr., p. 22.

B.

Police Station Identification Was Solitary

Second, in the instant case the identification was of a single man seated in a room with a police officer and no one else present. In Wright, it appears that some effort was made to simulate a line-up in that the police room contained "about a half dozen police

officers in plain clothes." Thus, the suggestive nature of the identification was even more obvious in the instant case than in Wright.

C.

The Chain Of Events Leading To Appellant's Arrest Were Indirect

Third, it is a noticeable coincident of both Wright and the instant case that apprehension of the accused was through auto tags; but in Wright the casual relationship was direct while here it was indirect. Thus, in Wright the accused was apprehended as the driver of the car whereas in the instant case it was the admitted accomplice, Short, who was arrested as the driver. It was only through Short (who later became a prosecution witness and against whom charges were dropped) that the accused was seized.

From the foregoing it is obvious that Krause's in-court identification was tainted by the police station identification and his entire testimony as to the accused should have been excluded. Without Krause, the prosecution's case depends solely on the informer-accomplice granted immunity. We respectfully request this Court to take judicial notice of the fact that at the accused's first trial which resulted in a hung jury, Mr. Krause was not a witness, he having been out of the country at that time.

IV.

LOWER COURT, UNDER CIRCUMSTANCES OF CASE, FAILED TO PROPERLY INSTRUCT JURY ON ACCOMPLICE TESTIMONY

Stripped of the identification at the Police Precinct Station, all that remains is the testimony of Short.

Clearly Short is an accomplice. Anyone who voluntarily and

Knowingly cooperates with, aids, assists, advises or encourages another in the commission of a crime is an accomplice. Tomlinson v. United States (1937) 68 App. D.C., 106, 109, cert. den. sub. nom. Pratt v. United States 303 U.S. 642 (1938), Egan v. United States 52 U.S. App. D.C. 384, 390 (1923).

For obvious reasons, the testimony of an accomplice should be received with caution and scrutinized with care and the jury must be instructed on the inherent problem of accomplice testimony. Stith v. United States (1966) 124 U.S. App. D.C. 82; William C. Bishop v. United States (1957) 100 U.S. App. D.C. 88; McQuaid v. United States (1952) 91 U.S. Appl. D.C. 229. "Accomplice testimony is regarded with suspicion." Surratt v. United States (1959) 106 U.S. App. D.C. 49.

Such an instruction was given, Tr., Vol. 2, pp. 26-27. But before the jury at that point was Krause's identification as support for Short's testimony. Without such support which we believe was inadmissible for the reasons set forth herein, the jury should have been instructed more carefully as to the inherent unreliability of uncorroborated accomplice testimony.

CONCLUSION

For the reasons set forth it is respectfully requested that the judgment of conviction and sentence be vacated and the indictment be dismissed; or, alternatively, that the conviction be reversed and the case remanded for a new trial; or, alternatively, that the conviction be reversed and the case remanded for a District Court hearing on the effect of the tainted identification evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief for Appellant in Criminal No. 20,953 has been served on the United States of America by delivering five copies by first class mail postage prepaid addressed to the Office of the United States Attorney, U. S. Courthouse, Washington, D. C. this 11th day of March, 1968.

Mitchell Blankstein
Mitchell Blankstein

Kingdon Gould, Jr.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,953

SIDNEY L. GROSS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
DANIEL J. GIVELBER,
Assistant United States Attorneys.

Cr. 504–66

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

I. Must appellant's conviction for housebreaking and grand larceny be reversed and a judgment of acquittal entered in his case solely because of a delay in the filing of the trial transcript when that delay does not even raise a possibility of prejudice to appellant's case?

II. Must appellant's conviction by a jury be either remanded for further findings or reversed outright simply because one of the Government's eye-witnesses saw appellant in the police precinct less than ten hours after the crime when appellant was identified at trial by the other eye-witness (who had been with appellant before, during and after the commission of the crime) as well, and the record otherwise demonstrates no likelihood of irreparable misidentification?

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TABLE OF CASES

OTHER REFERENCES

*Cases chiefly relied upon are marked by an asterisk.

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,953

SIDNEY L. GROSS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was indicted for one count of grand larceny (22 D.C. Code § 2201) and one count of housebreaking (22 D.C. Code § 1801) in April of 1966. After appellant's first trial on these charges ended in mistrial because of the jury's inability to agree, he was tried and convicted before another jury on both counts on December 13 and 14, 1966. On March 17, 1967, appellant was sentenced to two to six years imprisonment on each count, to run concurrently. Appellant applied for leave to appeal without prepayment of costs on March 27, 1967, and leave was granted on April 6, 1967.

Events of March 18 and 19, 1966

The Government presented four witnesses at trial: James Short, Jr., Keith Krause, Leo Small and Detective Reverdy Orme. Two of these—James Short, Jr. and Keith Krause—were eye-witnesses to the crime.

On the evening of March 18, 1966, Mr. Short was at work as a barber in Chick's Barber Shop at 3408 Fourteenth Street, N.W. when appellant entered the premises. (Tr. 34–35.)[1] Appellant, whom the witness had never seen before, approached Mr. Short, greeted him, ascertained his name and confirmed that Mr. Short had been an inmate of the Training School. (Tr. 59–60.) Appellant then offered Mr. Short $200 for the use of his car that evening, assuring him that he (Mr. Short) would not get into trouble. (Tr. 62.) Mr. Short told appellant where the car was located, and met him at the car between 9:00 and 9:30 that evening. (Tr. 63–64.) At this point appellant was dressed in a large black hat and a dark trench coat, and had put a light tan or white trench coat in the back seat of Mr. Short's car. (Tr. 65, 69.)

Mr. Short first drove appellant down Fourteenth Street to the area of Fourteenth and F Streets, and there let appellant out of the car while Mr. Short drove around the block. (Tr. 72.) Appellant got in the car again and asked to be driven to the Maryland suburbs, which Mr. Short did. (Tr. 41, 73.) The two men stopped at a service station in the suburbs and then returned to the area of Fourteenth and Irving in the District of Columbia. (Tr. 41, 78.) At this point, appellant put a gun in the glove compartment of Mr. Short's car and went into the Birdland night club. (Tr. 79.) After about twenty minutes, appellant returned with another man and both got into the car. (Tr. 43.)

After first returning to the area around Fourteenth and G, Mr. Short then drove, at appellant's direction, to Wisconsin Avenue and stopped on the street opposite a fur store. (Tr. 44–45.) Appellant then changed his coat, took an axe, went to the fur store, smashed a hole in the window of the store, took a white fur stole and returned to the car, getting in the passenger side of the front seat. (Tr. 46, 47, 86–89.)

Upon appellant's return to the car, Mr. Short drove off, eventually dropping appellant and the other man at Fifteenth and Florida Avenue. (Tr. 48, 92). Appellant left the fur in the car and told Mr. Short that he would meet Mr. Short at around 9:00 that morning at Seventh and Kennedy Streets and at that

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[1] The references in parenthesis are to pages in the trial transcript.

time would give Mr. Short the two hundred dollars (Tr. 48). Mr. Short then drove to get a sandwich and then home (Tr. 48). When he arrived at home he pulled into the regular parking place and then observed "lights coming across the street from where I was parked" and assumed it was the police and ran. (Tr. 50.) He went to his cousin's house a block and one-half away and remained there until his father called him (Tr. 51).

Mr. Short went with his father to the Seventh Precinct and related the above events to the police identifying appellant only as "Sidney" (Tr. 52, 100). He then went with the police to Seventh and Kennedy Street and waited for appellant. Appellant did not show up, and the police went with Mr. Short to Mr. Short's place of employment. Appellant was standing in front of the barber shop. Mr. Short pointed him out to the police, and appellant was arrested (Tr. 53–54).

Mr. Short's testimony was in large part confirmed by two other witnesses; Keith Krause and Detective Reverdy Orme.[2] Mr. Krause was living at 1632–A Wisconsin Avenue on March 19, 1966 and was studying in the early morning hours of that day when he heard a burglar alarm go off at Mr. Small's fur store located at 1620 Wisconsin Avenue. (Tr. 12) He went to the window and observed a car parked on Wisconsin Avenue and saw appellant stepping off the curb in front of the fur store carrying a white fur stole (Tr. 12). He continued to watch as appellant walked into Wisconsin Avenue, went around the rear of the waiting car, and got into the front seat next to the driver (Tr. 12). The car was stopped on Wisconsin Avenue some fifty to seventy-five feet from Mr. Krause's window (Tr. 15). It was very near a street light and the night was clear (Tr. 24–25), all of which enabled Mr. Krause to get a good look at both appellant and the license number of the car. He gave the license number of the car to the police (Tr. 13–14), and described appellant as Negro, in his late twenties, fairly good sized

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[2] These events were also partially confirmed by Mr. Leo Small, owner of Leo Small Furs, located at 1620 Wisconsin Avenue who testified that sometime between five p.m. on March 18, 1966 and 2:30 the next morning the window of his store was smashed, a white mink stole was stolen, and a hatchet was left inside the store (Tr. 1–6).

(approximately six feet, two inches), wearing "a white or light colored rain coat, not necessarily perfectly white", a dark broad brimmed hat, and dark slacks (Tr. 21–23).

Detective Reverdy Orme of the Seventh Precinct went to 1620 Wisconsin Avenue at about 2:30 in the morning of March 19, 1966. He there talked to Mr. Krause and got the license plate number of Mr. Short's car (Tr. 109). He then drove to the vicinity of Mr. Short's house and, after waiting an hour, observed Mr. Short's car drive up and Mr. Short get out and run away (Tr. 110). Detective Orme then got the permission of Mr. Short's father to look through the automobile, and discovered the stolen fur in the back seat. (Tr. 111–12.) Later that morning, Mr. Short and his father came to the precinct. (Tr. 113) After speaking with Mr. Short and learning of the role played by "Sid", Detective Orme and Mr. Short went first to Seventh and Kennedy Streets and then to Chick's Barber Shop where Mr. Short pointed appellant out to Detective Orme. (Tr. 114, 115, 127)

Trial

At the trial, the witness testified as described above. Appellant did not testify, nor did anyone else testify on his behalf. Both Mr. Short and Mr. Krause made in court identifications of appellant. Mr. Krause, on direct examination, also testified that he saw appellant at the Seventh Precinct on March 19, 1967. On cross-examination, Mr. Krause testified that he was asked by the police to enter a room containing appellant and a police officer, and that upon leaving that room he informed the police that appellant was the man who he had seen with the fur (Tr. 31–32). The entire testimony regarding this incident is set out in the margin below.[3]

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[3] **Q. Now, Mr. Krause, talking about having come down to the No. 7 Precinct at twelve o'clock Saturday, March 19; when you came to the Precinct did the officer there take you in to look at a lineup of a number of people?**

A. No, it was one person.

Q. But were there a number of people?

A. No, there was one police officer and one non-police officer at the time.

Q. And was this person standing or seated?

A. He was seated. Well, I will redefine that. I believe he was standing up.

Detective Orme also described this identification:

> "Mr. Krause came down to look, and Sidney Gross was sitting there, and I told him to stand up and Mr. Gross stood up, and he said that was the man he saw getting into the car, and he identified him as the man." (Tr. 125–6)

Detective Orme stated that James Short had told him, prior to the apprehension of appellant, that the man who had committed the housebreaking was named "Sid" but did not give him the full name of Sidney Gross nor was that name suggested to him by the police (Tr. 127). He also said that he made no representation to Short that he would be given probation or that the charges would be dropped against him because he gave the police information (Tr. 123), and in fact charged Short with housebreaking (Tr. 116). Mr. Short testified that he was told that his cooperation would get some consideration (Tr. 101) and that the charges against him were dropped (Tr. 104).

Q. When you saw this person, what did you say?
A. Nothing.
Q. You saw the person and did nothing?
A. I wasn't supposed to talk. I was merely asked to look at him.
Q. And can you tell me what happened after that?
A. After that?
Q. Yes.
A. I went back home.
Q. Did you talk to anybody? Anybody at the police station, before that?
A. Well, he asked me if I thought the person I saw in the room was the same person that I had seen at the scene of the crime, and my answer was yes.
Q. You didn't say it in the room when you were in there, did you?
A. What do you mean?
Q. Well, I assume you went in there to identify this man.
A. Well, I didn't walk right up to the man, but when we came out he asked me if it was the same person that I had seen at the scene of the crime, and I told him yes.
Q. Who did you mention this to?
A. To the police officer.
Q. Do you remember which police officer it was?
A. Well, we were directly outside the room.
Q. What did you say?
A. I told the officer that that was the person I saw with the fur. (Tr. 31–33)

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CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Sixth Amendment of the Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . .

Title 22, District of Columbia Code, Section 1801, provides:

> Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

Title 22, District of Columbia Code, Section 2201, provides:

> Whoever shall feloniously take and carry away anything of value of the amount or value of $100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years.

SUMMARY OF ARGUMENT

I

Delay in the filing of the transcript of his trial does not require that appellant's conviction by a jury of housebreaking and grand larceny be remanded with instructions to enter a judgment of acquittal. If appellant's conviction is otherwise reversed, it may or may not be that the delay in the preparation of the transcript can be considered in determining whether appellant's retrial would be in derogation to his Sixth Amendment right to a speedy trial. Absent such a circumstance, however, appellant is not prejudiced by the delay as he cannot

demonstrate even a possibility of prejudice to his case on appeal. Further, appellant cannot now request the drastic relief he proposes after having failed to pursue less drastic remedies which could have secured earlier preparation of the transcript.

II

Appellant's due process rights are not infringed solely because he was identified in a one-man show-up after his arrest. There must have been a substantial likelihood of irreparable misidentification flowing from this confrontation as well. There was no likelihood, much less a very substantial one, of irreparable misidentification in this case when: (a) the identification was as "fresh'" as humanly possible; (b) the identification was made by a witness whom the record demonstrates to have been cool-headed, precise, and unlikely to be susceptible to suggestion; and (c) the identification by this witness, as well as the rest of his testimony which detailed the manner in which the crime was committed, was confirmed at trial by another witness who had been with appellant before, during and after the commission of the crime.

ARGUMENT

I. Appellant is not entitled to a judgment of acquittal due to delay in the preparation of the trial transcript

Appellant contends that this Court should reverse his conviction and remand the case with an order to enter a judgment of acquittal because of the delay involved in the preparation of the transcript. Appellant's argument, apparently, is that the Sixth Amendment right to a speedy trial should also extend to the statutory right to an appeal of the conviction resulting from that trial, and that the ten month delay in the preparation of a transcript violates appellant's right to a speedy trial. Appellant's argument misconstrues the nature of the right to speedy trial and should be rejected.

Appellant's argument is premature. If appellant's present appeal succeeds on other grounds and appellant must be retried, it may or may not be that the ten month delay involved in pre-

paring the transcript on this appeal can be considered in a determination of whether or not appellant's right to a speedy trial has been denied with respect to his second trial.[4] If the appeal does not succeed on other grounds, however, then the delay has not prejudiced appellant. *Manning* v. *United States*, 125 U.S. App. D.C. 256, 371 F. 2d 353 (1966).

It is fundamental that the mere passage of time does not in and of itself violate even the Constitutional Sixth Amendment right to a speedy trial. *Smith* v. *United States*, 118 U.S. App. D.C. 38, 331 F.2d 784 (1964), (*en banc*). *Hedgepeth* v. *United States*, 124 U.S. App. D.C. 291, 364 F.2d 684 (1966). It is equally clear, therefore, that the mere passage of time between conviction and appeal does not in and of itself entitle the appellant to a judgment of acquittal. The delay between arrest and trial at least raises the possibility of some prejudice to the ability of the accused to defend himself; there has been no suggestion, nor could there be, that this delay raised even the possibility of prejudice to appellant's case on appeal.

Finally, even the right to speedy trial can be waived by inaction. *James* v. *United States*, 104 U.S. App. D.C. 263, 261 F.2d 381 (1958), *cert. denied*, 359 U.S. 930 (1959). Appellant did not move for the issuance of the extraordinary writ of mandamus to compel the court reporter to prepare the transcript, as he might have. See *United States* v. *Metzger*, 133 F.2d 82 (9th Cir.), *cert. denied, sub nom Oswald* v. *United States*, 320 U.S. 741 (1943) and *Holmes v. United States*, —— U.S. App. D.C. ——, 383 F.2d 925, fn.4 (1967). Additionally, appellant might have moved for release from custody on bond pending appeal, if appropriate, which he did not do. Under these circumstances, and for the reasons given above, it is clear that appellant is not entitled to the relief he now seeks.

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[4] The issue of whether delay in appellate process, not attributable to delay in the preparation of transcript, may have delayed a retrial in such a manner as to deprive the accused of his right to a speedy trial may have formed the basis for a grant of writ of certiorari in *Harrison* v. *United States*, *cert. granted*, 36 U.S.L.W. 3226 (1967).

II. Appellant was not deprived of due process of law

(Tr. 12–13, 21–22, 29–33, 46, 64–65, 69, 85, 87–90.)

Appellant argues that under *Wright* v. *United States,* D.C. Cir. No. 20,153, slip opinion January 31, 1968, this matter must either be remanded for a hearing to elucidate the circumstances surrounding the pre-trial identification by Mr. Krause or reversed outright. This contention should be rejected both because it was not raised below [5] and because it lacks merit.

In *Wright* v. *United States, supra,* as well as in *Wise* v. *United States,* —— U.S. App. D.C. ——, 383 F.2d 206 (1967) and *Issac* v. *United States,* D.C. Cir. No. 20,544, decided March 11, 1968, this Court recognized that under *Stovall* v. *Denno,* 388 U.S. 293 (1967), a pre-trial identification could be conducted in a manner "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to amount to a denial of due process of law. Whether or not due process has been denied an accused in a given case depends on an analysis of "the totality of circumstances surrounding" the identification, *Wright, supra,* p. 6, in order to determine whether there has been divergence "from the rudiments of fair play that govern the due balance of pertinent interests that suspects be treated fairly while the state pursues its responsibility of apprehending criminals." *Wise* v. *United States, supra,* at 210. The standard to be applied has been suggested by the Supreme Court in the case of *Simmons* v. *United States,* 36 U.S.L.W. 4227 (March 18, 1967). The Court there dealt with the claim that a photographic identification of the accused deprived him of due process of law by noting that such a claim could succeed only:

> ". . . if the photographic identification procedure was *so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. This standard accords with our resolution of a similar issue in Stovall v. Denno* . . ." 36 U.S.L.W. at 4229. (Emphasis added.)

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[5] *Schmerber* v. *California,* 384 U.S. 757, 765 (fn.9) (1966); *United States* v. *Indiviglio,* 352 F.2d 276 (2nd Cir. 1965) (*en banc*), *cert. denied,* 383 U.S. 907 (1966).

There has been no showing, nor could there be, that appellant's conviction is infected by a "likelihood" of misidentification, much less a "very substantial likelihood" of irreparable misidentification. Appellant points out that the identification of appellant by Mr. Krause was made without benefit of line-up; that appellant was exhibited alone to Mr. Krause for identification. This naked fact, however, does not amount to showing of likelihood of irreparable misidentification. In *Stovall* v. *Denno*, *supra*, *Wise* v. *United States*, *supra*, and *Isaac* v. *United States*, *supra*, the identification was made when the accused was exhibited alone to the witness. Further, in each of those cases the identifications were made by the victims of the crimes, the people least likely to get a dispassionate and objective view of the criminal and least likely to make a dispassionate and objective identification in a one man confrontation. Yet in all three of the cases the convictions were upheld as without any consitutional infirmity.

On the other hand, a due process claim was upheld in *Palmer* v. *Peyton*, 359 F. 2d 199 (4th Cir. 1966) when it was obvious to the court that the identification was conducted in a manner guaranteed to secure a conviction rather than as an aid to assuring that the police in fact had the right man.[6] In *Wright* v. *United States*, *supra*, this issue was resolved in yet another way. This Court dealt with the possible constitutional objections to an identification resulting from what may have been a one-man confrontation by remanding the matter to the District Court. This Court concluded that only a further elucidation of the facts surrounding the identification would permit the District Court to determine whether the circumstances of the identification

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[6] In that case there was not even a confrontation; in fact, there was a denial of confrontation. The police kept the accused in one room and the victim in another, and forced the accused to speak. The victim, who had earlier been shown a shirt similar to the one the rapist had worn and had been told that it belonged to the accused, identified the voice alone, without ever seeing the man accused of raping her. At trial she testified to this identification alone, without ever making an in-court identification of the accused. In less extreme circumstances, when it was clear that the one-man confrontation was employed as an aid to determining the identity of the culprit, the Fourth Circuit was untroubled by the identification resulting from the confrontation. *United States* v. *Quarles*, 387 F. 2d 351 (4th Cir. 1967).

were "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to amount to a denial of due process.

In final analysis, these decisions all focus on what Justice Harlan characterized in *Simmons* v. *United States, supra,* as the "likelihood of irreparable misidentification." "Suggestiveness" alone does not determine whether there has been a violation of due process. Thus in *Wise* v. *United States, supra,* the contested identification was made by the witness after the police returned to the scene of the crime with both a single suspect and the witness' husband who had already identified the suspect. These circumstances were highly suggestive; clearly more suggestive than those involved herein. Nevertheless, this Court held that the identification did not violate due process because "[h]ere were circumstances of fresh identification, elements that if anything promote fairness, by assuring reliability . . ." 383 F. 2d at 209. In *Issac* the identification was made under circumstances similar to those herein; the court upheld the conviction because it was consistent with earlier photographic identifications of the accused by the same witnesses. In *Stovall* v. *Denno, supra,* the accused was exhibited to the victim while encased in chains and surrounded by five police officers, a confrontation vastly more suggestive than that involved in this case. Yet the situation demanded the procedure in *Stovall*, and the Supreme Court found no due process violation in either the procedure used or the testimony about it, by police officers as well as the victim, at trial.

When, however, there was just a single eye-witness to a crime and the accused came forth with a substantial alibi defense, this Court concluded in *Wright* v. *United States, supra,* that the combined circumstance of the witness seeing the accused's car (which she could identify) in front of the police station and the accused inside the police station presented the "possibility that the limits set by the demands of due process were exceeded here". Therefore, the case was remanded to the District Court for a further exploration of that issue.

Here, as in *Wise* and *Issac*, and unlike *Wright*, there is no "likelihood of irreparable misidentification" of appellant. The identification was arranged in order to confirm or discredit the

story of James Short; its potential result was as consistent with appellant's immediate release as with his detention, trial and conviction. The identification was held as soon as humanly possible after the apprehension of appellant, thereby assuring that as many of the "circumstances of fresh identification" as possible were present. The witness was a cool-headed and precise person, unlikely to be influenced by the claimed suggestiveness of the circumstances of the identification.[7]

Further, Mr. Krause was not the only witness to the incident. James Short was there and there can be no question concerning his identification. James Short, by the early morning of March 19, 1966, knew appellant only too well. Before appellant was ever apprehended James Short told the police that his name was "Sid". Appellant was first spotted by Short and the police outside the barber shop where Short worked, the logical place for appellant to have gone once the meeting at Seventh and Kennedy failed to materialize. Short's description of appellant's clothes matched that of Mr. Krause (Tr. 21–22, 46, 64–65, 69, 85), as did his description of the events at the fur store (Tr. 12–13, 87–90). Thus, even excluding Mr. Krause's identification of appellant, there was substantial corroboration of Mr. Short's story, and more than sufficient evidence of appellant's guilt. And, unlike *Wright* v. *United States, supra,* appellant presented no defense. It is clear, then, that there was no likelihood that appellant was the victim of "irreparable misidentification". Appellant's argument on this point lacks merit, and should be rejected.[8]

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[7] These qualities are evident throughout Mr. Krause's testimony on both direct and cross examination. See, generally, pp. 10–30, particularly p. 12 (general description of the events), p. 15 (estimate of distance between witness and car), pp. 21–22 (description of appellant) p. 27 (description of other people in the car) and pp. 29–33 (description of confrontation at Seventh Precinct).

[8] Appellant also suggests, that, absent Mr. Krause's testimony, the testimony of James Short was uncorroborated and that, therefore, the jury should have been instructed "more carefully" on accomplice testimony. (Appellant's Brief, pp. 15–16) Appellant does not suggest in what respects the trial judge misstated the law or what he should have instructed in lieu of the instruction actually given. This argument is devoid of merit. First of all, as shown above, the identification was properly admitted in evidence. Secondly, even assuming *arguendo* that the identification should not be

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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admitted, Mr. Krause's other testimony corroborates that of Mr. Short in many significant respects. Thirdly, *Bishop* v. *United States*, 100 U.S. App. D.C. 88, 243 F. 2d 32 (1967), *McQuaid* v. *United States*, 91 U.S. App. D.C. 229, 198 F. 2d 987 (1952), *cert. denied*, 344 U.S. 929 (1953) and *Stith* v. *United States*, 124 U.S. App. D.C. 81, 361 F. 2d 535 (1966), all cases cited by appellant, indicate that the instruction in this case was perfectly proper even if the testimony of the accomplice was uncorroborated.

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